No. 20,070

IN THE

United States Court of Appeals

For the Ninth Circuit

CASE-SWAYNE CO., INC., a corporation,
Appellant,

vs.

SUNKIST GROWERS, INC., a corporation,
Appellee.

APPELLANT'S OPENING BRIEF

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INDEX

Table of Authorities

Cases

Rules

Statutes

Texts

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JURISDICTION OF THE DISTRICT COURT AND THE COURT OF APPEALS

Complaint for treble damages under Section 4 of
le Clayton Act wherein the plaintiff Case-Swayne
o. alleged that Defendants Sunkist Growers, Inc.,
hereinafter referred to as Sunkist, the Exchange
range Products Co., hereinafter referred to as Ex-
change Orange, and Exchange Lemon Products Co.,
hereinafter referred to as Exchange Lemon, combined
ad entered into contracts and conspired and have
onopolized and attempted to monopolize the trade
i product oranges grown in California and Arizona
i violation of Sections 1 and 2 of the Sherman Act.

Jurisdiction of the District Court is based under Sections 1 and 2 of the Sherman Act, Act of July 2, 1890, Chapter 647, Sections 1 and 2, 26 Stat. 209, and Section 4 of the Act commonly referred to as the Clayton Act, 38 Stat. 730, Act of Oct. 15, 1914, 15 U.S.C. Secs. 1, 2, and 15, respectively (C.T. 1-2).[1]

Final judgment was entered in the matter March 2, 1965 (C.T. 2110-11). Jurisdiction of the Court of Appeals for the 9th Circuit is based on the Notice of Appeal filed March 29, 1965 (C.T. 2142) pursuant to Rule 73(a) (b) Rules of Civil Procedure for the United States District Courts.

STATEMENT OF THE CASE

I. THE PROCEEDINGS

This case is before this Court on an appeal from the District Court's judgment based on the District Court's order granting defendant's motion for a directed verdict (C.T. 2093-2104).

The proceedings relating to the questions presented on appeal are, briefly, as follows:

April 15, 1958, plaintiff filed its complaint against defendants Sunkist, Exchange Orange and Exchange Lemon, alleging they had conspired and entered into contracts to restrain trade and had monopolized and

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[1]Pages and lines in Clerk's Transcript are referred to as follows: C.T. : (line).
Pages and lines in Reporter's Transcript are referred to as follows: R.T. : (line).

ttempted to monopolize the trade in product oranges rown in California and Arizona in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. Secs. 1 nd 2), alleging damages by reason of defendant's cts in the sum of $800,000.00 and praying that damges be trebled pursuant to Section 4 of the Clayton ct, 15 U.S.C. Sec. 15 (C.T. 1-13).

July 21, 1958, defendants answered the complaint enying conduct in violation of the Sherman Act and lleging an affirmative defense that defendants were gricultural marketing associations meeting the requirements of Sec. 6 of the Clayton Act (15 U.S.C. Sec. 17) and of Sec. 1 of the Capper-Volstead Act (7 U.S.C. Sec. 291) and that the claimed violations of he antitrust laws "are exempt from the antitrust aws by said statutes." (C.T. 155-170).

On October 31, 1958, the defendants Exchange Orange and Exchange Lemon merged into Sunkist. Sunkist assumed all the obligations of the merged corporations and pursuant to motion of Sunkist the defendants Exchange Orange and Exchange Lemon were lismissed from the action (C.T. 611-12).

On June 29, 1962, pursuant to leave of Court duly obtained, plaintiff filed a supplemental complaint pleading transactions occurring since the date of the original complaint and alleging additional damages thereby from April 15, 1959, to January 31, 1962, in the sum of $1,412,000.00 (C.T. 1078-1083). Sunkist filed no answer to the supplemental complaint.

A hearing had been scheduled on March 2, 1964, relating to plaintiff's objections to certain interroga-

tories. In plaintiff's Memorandum in Reply to "Defendant's Memorandum of Points and Authorities in Support of Opposition to Plaintiff's Objections to Certain Interrogatories", filed February 26, 1964 (C.T. 1188-1194, particularly 1190:7-17), plaintiff advised defendant that it would request the Court at the hearing for leave to file a second supplemental complaint to bring matters up to date (C.T. 1190:7-17).

At the hearing of March 2, 1964, plaintiff asked leave of the Court to file a second supplemental complaint to plead transactions occurring since the filing of the supplemental complaint and alleging additional damages in the amount of $650,000.00 for the period from January 31, 1962, to January 31, 1964 (R.T. 59A:12-24; C.T. 1283 et seq.).

Defendant made no objection to plaintiff's motion and the Court announced it would permit the filing of the second supplemental complaint. Plaintiff's proposed second supplemental complaint was served on defendant March 2, 1964 (C.T. 1286:27-29) and lodged with the Court April 3, 1964 (C.T. 1283).

Defendant was instructed to prepare pre-trial order No. 1 covering the Court's rulings at the March 2, 1964 hearing. Sunkist did not include in its proposed pre-trial order an order permitting the filing of plaintiff's second supplemental complaint. Plaintiff therefore submitted to the Court a substitute order covering the Court's oral announcements (C.T. 1311-1313 at p. 1313:5-7). The Court did not sign plaintiff's substitute order. Therefore at a hearing held May 18, 1964, the plaintiff reminded the Court of plaintiff's pending

motion to file a second supplemental complaint, and again the Court stated it would permit filing of such complaint (R.T. 92A:6-20).

At a hearing on October 12, 1964, and after plaintiff's records were complete, plaintiff asked leave to substitute a second supplemental complaint for the one previously lodged with the Court to accurately specify the damages in the amount of $806,000.00 for the period covered by the second supplemental complaint (R.T. 133A:1-134A:1). The Court stated plaintiff could make its motion on the second supplemental complaint on October 26, 1964, when there was scheduled defendant's motion to compel answer to certain interrogatories. The motion to compel answer to interrogatories was withdrawn, plaintiff having elected to answer the interrogatories (C.T. 1780). Hence there was no hearing on October 26, 1964.

Plaintiff, relying on the Court's oral pronouncements of March 2, 1964 and May 18, 1964, prepared its numerous exhibits to cover the complete period encompassed in the lawsuit from April 15, 1958 (original complaint) to January 31, 1964 (R.T. 136A:16-22; 139A:6-140:15).

On October 28, 1964, defendant filed a motion for an order prohibiting plaintiff from filing a second supplemental complaint (C.T. 1891-3). On November 9, 1964, the day before trial commenced, the Court announced it would not permit the filing of the second supplemental complaint (R.T. 134A:16-22) and an order prohibiting filing of the same was filed October 10, 1965 (C.T. 1925-26).

Early in April, 1961 (C.T. 1804) the parties had presented to the Court a stipulation of facts relating to Sunkist's, Exchange Orange's and Exchange Lemon's defense to the original complaint that they had complied with Sec. 1 of the Capper-Volstead Act and authorizing the Court to rule on that issue. The stipulation was not filed by the Court until October 27, 1964 (C.T. 1790, et seq.). However, prior to the filing or the reading by the Court of the stipulation relating to the Capper-Volstead defense, the Court had read the decision of the Supreme Court in *Sunkist Growers, Inc. v. Winckler and Smith Citrus Products Co.,* 370 U.S. 19 (1962) and had concluded that the Supreme Court in the *Winckler* case had ruled that Sunkist was an association organized in compliance with Sec. 1 of the Capper-Volstead Act and that the *Winckler* decision on this issue was binding on the plaintiff in the instant case (R.T. 5A:6-6A:6; 45A:3-18). Based on this conclusion, the Court in Pre-trial Order No. One, filed April 22, 1964, ruled that Sunkist, Exchange Orange and Exchange Lemon had complied with the provisions of Sec. 1 of the Capper-Volstead Act (C.T. 1307:10). In Pre-trial Order No. One the Court also ordered two separate trials of this cause: the first trial to cover the issue of liability and, if plaintiff prevailed, the second trial to cover the issue of damages.

Pursuant to the Court's ruling that defendants had complied with the Capper-Volstead Act, the Court in Pre-trial Order No. Two filed May 26, 1964, ordered that the issues of this cause were confined to whether

Sunkist had a monopoly on oranges grown in California and Arizona, whether it had illegally used any such monopoly power or had attempted to monopolize such oranges, and damages (R.T. 68A:6-12; 76A:17-25; C.T. 1359-60).

Trial was had from November 10, 1964, to November 30, 1964, when plaintiff rested (R.T. 1220:25). Defendant, without offering evidence, moved for a directed verdict (see motion for directed verdict lodged November 30, 1964, C.T. 1964-66, superseded by proposed order for directed verdict lodged December 28, 1964, C.T. 2056).

On March 1, 1965, the Court filed its memorandum and order granting defendant's motion for a directed verdict (C.T. 2093-2104). Final judgment was filed and entered pursuant to said order on March 2, 1965 (C.T. 2110-11).

II. THE EVIDENCE[2]

A. Description of the Parties.

Plaintiff and Plaintiff's Business. Plaintiff, a corporation, for all the period covered in this action (April 15, 1955 to January 31, 1962), had been engaged in the orange product manufacturing business (R.T. 433:13-20). This business consisted of the

[2]"The Evidence" relates to specification of error 1, and point I of Argument, namely, that the Court erred in granting defendant's motion for a directed verdict. Evidence particularly relating to plaintiff's other specifications of error is treated in argument thereon.

purchase of oranges and the manufacture of them into orange products for resale. Plaintiff's orange products were canned orange juice and blends of orange juice with other fruit juices. Plaintiff's orange products are single strength juices, that is, they are not concentrates but are the natural juices unmixed with water (R.T. 434:6-17).

The Defendants and their Business. As noted above, the action was commenced against Sunkist, Exchange Orange, and Exchange Lemon (corporations) but was dismissed as to Exchange Orange and Exchange Lemon when these defendants merged into the surviving corporation Sunkist, on October 31, 1958. After the merger, Sunkist carried on the functions that had been previously carried on by defendants Exchange Orange and Exchange Lemon in the Sunkist system (Admission 3(h), C.T. 1367:25-29, 1368:20). Hence, acts of Exchange Orange and Exchange Lemon refer to acts of these companies prior to their merger into Sunkist.

Sunkist, with its subsidiary corporation Exchange Orange, during the period covered by the complaint, acted as agent for the Sunkist organization in the following capacities: In the sale of oranges destined for retail consumption as fresh fruit; in the manufacturing of oranges into orange products and the sale of such products for resale and in the sale of oranges for product manufacture to other manufacturers of orange products (Plf's Exs. 1, 2; Admission No. 3, C.T. 1367:11-1368:26; R.T. 451:2-20). With respect to

Sunkist's handling of oranges for product use, Sunkist was vertically integrated with dual distribution. For products, it sold in competition with manufacturers of orange products who purchased orange supplies from Sunkist. (General Foods, R.T. 543:4-10; 549:12-550:3; Hyland-Stanford Co., R.T. 513:12 to 514:6; TreeSweet, R.T. 345:2-22; 706:13-25; Case-Swayne Co., Plf's Exs. 131, 132, R.T. 792:6-13; 823:2-17). Sunkist's dominant control of oranges grown in California and Arizona together with its vertical integration and dual distribution with respect to oranges designated for product use is the phase of Sunkist's operations that this cause is particularly concerned with.

Exchange Orange from the commencement of this action, April 15, 1958, until its merger into Sunkist October 31, 1958, was a 100% owned subsidiary of Sunkist; the Board of Directors of Exchange Orange consisted of the same Board of Directors as Sunkist (Admission No. 3(c) C.T. 1367:13-19; 1368:6-8). Exchange Orange was the adjunct of Sunkist for the sale of oranges for product use to manufacturers of orange products and for the manufacture of Sunkist orange products (Admission No. 3(e) and (f) C.T. 1367:21-24; 1368:12-18; R.T. 1108:7 to 1109:7). Exchange Lemon, from the commencement of this action and until its merger into Sunkist, was the manufacturing adjunct of Sunkist for the manufacture of lemon products from fresh lemons and it also manufactured orange products for Sunkist (Answer, C.T. 59:2-17; Admission No. 3(h) C.T. 1367:25-1368:26).

B. Interstate Commerce.

Oranges involved in this action were grown in California and Arizona; the oranges grown in Arizona are shipped all over the country. The orange products were shipped for resale throughout the various states of the United States and involved a continual stream of interstate commerce throughout the various states of the United States. Defendants at all times involved in this action carried on an interstate business in oranges grown in California and Arizona and orange products manufactured therefrom. (Admission No. 4, C.T. 1368:27-1369:11; R.T. 451:23-452:25).

C. The Product and the Relevant Market.

The product is oranges and specifically oranges utilized for the manufacture of orange products. Size and appearance can determine whether particular oranges should be diverted to product use. But that is not the sole factor in the determination of use of oranges for products. Oranges that can be sold as fresh fruit are utilized for product use in order to maintain fresh fruit prices. (Sunkist manager F. R. Wilcox, R.T. 951:16; 952:4; 966:2-8).

Substantially all oranges marketed in the United States are grown in California, Arizona, Florida and Texas (R.T. 454:1-4).

The relevant market in this cause was oranges grown in California and Arizona as defined in Pretrial Order No. Two, viz.,

> "(a) Did Sunkist have a monopoly of product oranges grown in the California-Arizona area?

(b) Did Sunkist illegally use any such monopoly power which it may have possessed?

(c) Did Sunkist attempt to monopolize product oranges grown in the California-Arizona area" (C.T. 1359:25-1360:6).

This was necessarily so because by reason of transportation costs plaintiff and other independent manufacturers of orange products had to obtain California- and Arizona-grown product oranges for their manufacturing activities in order to compete with manufacturers of orange products in the other orange growing areas of Florida and Texas (Plf's Pres. Amos Swayne, R.T. 439:1-440:2; Robert McCracken of TreeSweet Products Co., R.T. 86:4-20; the trial Judge, R.T. 982:14-24:

"Q. Would it be fair to say that manufacturers of orange products in California and Arizona had to purchase their fruit from California in order to operate economically their plants?

The Court: There is no dispute about that, is there, Mr. Henderson? The testimony has been that it would be uneconomical to try to ship fruit into California or Arizona from Florida or Texas. You have already established that. You are just accumulating evidence now. There is no dispute about that.")

Valencia oranges are the principal product oranges grown in California and Arizona. Single strength juice made from California *Valencia* oranges is the orange juice that is sold in competition with Florida's single strength juice. Single strength orange juice made from California *navel* oranges is generally sold

through government channels and the institutional trade (R.T. 486:22-25; 488:6-21).

Hereafter in this brief the term oranges will refer to oranges utilized for product use unless otherwise indicated.

D. Sunkist's Dominant Control of Oranges, Wrongful Use of Monopoly Power and Attempt to Monopolize.

1. Sunkist's Dominant Control of Oranges.

During the period involved, Sunkist controlled approximately 70% of all oranges grown in California and Arizona which embraced approximately 67% of such oranges diverted to product use. Other small cooperatives controlled *for their own* use approximately 18% of oranges grown in California and Arizona. The balance of the oranges (approx. 12%) represented those grown by independent growers and available to independent manufacturers, and were in the main handled by the Morgan Ward Co.

The evidence of this dominant control is shown in the following references: Plf's Exs. 92, 126, 124, 124A, 143; testimony of G. Herbert Holley of the Stanford Research, which testimony was the basis of Plf's Ex. 143 (R.T. 990-1020:15); testimony of Morgan Ward (R.T. 367:12-369:13); testimony of Carl Warnick with regard to Plf's Ex. 124A (R.T. 1189:1-1191:15 and defendant's Admission No. 7 R.T. 442:1 to 447:1; C.T. 1370:10-1371:10).

2. Sunkist's Wrongful Use of Monopoly Power and Attempt to Monopolize.

Sunkist's intention to control and utilize all oranges.

Sunkist obtained its oranges by contracts with citrus packing houses (which Sunkist refers to as "local associations"). When this action was commenced, such contracts were separate agreements between Sunkist and the packing houses (Plf's Ex. 1, the 1955 Sunkist District Exchange Agreement). In the reorganization of Sunkist of October 31, 1958 (wherein Exchange Orange and Exchange Lemon were merged into Sunkist) the citrus packing houses became members of Sunkist and the agreement providing for the sale of oranges by the packing houses to Sunkist was contained in the Sunkist amended articles of incorporation (Plf's Ex. 1A).

The contracts between Sunkist and the citrus packing houses, provide that the packing houses should enter into agreements with orange growers for the exclusive handling of growers' oranges by the packing houses and that the packing houses should market all oranges they controlled through Sunkist. Sunkist forbade the packing houses from "any contact with the trade, whether it originated with the shipper or the buyer, which deals with prices". Its prohibition was based on its assertion that "any contact with the trade which has the effect of undermining the sales representative falls within the spirit and probably the letter of By-law 9-4 cc." (Plf's Ex. 106, p. 2; R.T. 1125:11-1126:17).

Sunkist advertised to obtain growers for the Sunkist system (Plf's Ex. 103). It was the policy of Sunkist to obtain as many members as possible in the Sunkist system (Wilcox, R.T. 1117:14-16; Admission No. 6 C.T. 1369:25-1370:9). It organized Exchange Orange for the purpose of manufacturing into orange products all oranges it controlled and did not sell as fresh fruit (Wilcox, R.T. 1108:7 to 1109:7). Sunkist's position was that as a Capper-Volstead association it had the right to seek to control and use not only all the oranges in the relevant market (R.T. 1121:7-11; C.T. 1385:7-9; 1387:32-1388:6), but all the oranges in the United States. (R.T. 37A:9-25; 39A:11-25).

Boycott. Sunkist, with its vast accumulation of control over oranges, boycotted plaintiff from receiving oranges from Sunkist and the system it controlled. Sunkist in January or February, 1958, advised plaintiff it would not sell oranges to plaintiff or other independent manufacturers of orange products (R.T. 642:12-643:4). The action was commenced April 15, 1958. After the year 1957 and from then on plaintiff did not receive a pound of oranges from Sunkist (R.T. 647:8-24). By oral requests in July, 1959, in September, 1959, in January, 1960, in September, 1961, and by letter of plaintiff's counsel dated June 21, 1961, and by letter of plaintiff dated September 22, 1961, plaintiff requested Sunkist to let plaintiff know when Sunkist would sell oranges to plaintiff and that plaintiff at all times stood ready to purchase oranges from defendant. Sunkist never let plaintiff know and

never replied to plaintiff (Swayne, R.T. 648:1 to 665:1; Plf's Ex. 102).

While defendant was refusing to sell oranges to plaintiff, it was selling oranges generally to other manufacturers of orange products (Wilcox, R.T. 184:1-4). (Schedule B, Defendant's Answers to Plaintiff's 3rd Supplemental Interrogatories, Answers Nos. 4 and 5; C.T. 1693-1695).

In addition to boycotting plaintiff from Sunkist ranges, Sunkist prevented TreeSweet Products Co. rom delivering oranges to plaintiff that TreeSweet Products Co. had committed itself to deliver to plaintiff. Sunkist followed a truck of oranges it had sold o TreeSweet and discovering that the oranges were eing delivered to Case-Swayne successfully prevented rther deliveries that TreeSweet had committed to laintiff. This incident is related in the testimony of obert Buchheim, Vice-President of TreeSweet (R.T. 49:3-357:8; 371:19 to 372:23).

Price Control. Sunkist, by reason of its dominant ontrol of oranges grown in California and Arizona as able to establish the prices of product oranges in at market. There were so few other oranges avail-ble to independent processors that other sellers of anges could obtain for themselves the Sunkist price, hether established by Sunkist sales at its bid sys-m (hereinafter mentioned), or by outright sale. Dur-g the period Sunkist was not selling oranges the rice was established by Sunkist's anticipated returns r product oranges to the Sunkist growers. This was tablished by testimony of Morgan Ward, who

handled the oranges of independent growers and, who, after Sunkist, was the principal source of supply for independent manufacturers of orange products:

> "The Witness: Well, in the citrus by-product business, we know that Sunkist is the largest, and the days when they set a price, we followed that price. Then when they put out bids, we found out what those bids were, and if it was 2 or 3 days before we found out what was accepted, we waited until we found out what the top bid was, and then we billed our customers retroactively back, so that everybody in the citrus business were competitive. Then when Sunkist did not sell any fruit at all on any basis, then we would find out from their packing houses, we would talk to employees here and there and we would find out, 'Well, what do you think you are going to pay for by-products fruit?' 'Well', they would say, 'from the powers that be in Sunkist, we are going to receive so and so.' Then we would go from there and arrive at a price we thought would be comparable so that all would be equal in price in the State of California. That's the only way we could do it." (R.T. 374:19-375:13).

Morgan Ward's testimony was corroborated by testimony of Robert Buchheim (R.T. 334:18-335:23) and Robert McCracken (R.T. 123:15-125:3), both of Tree-Sweet. Robert McCracken, on cross-examination stated that Florida's high production and its prices were the dominating influence of the prices of product oranges in California. (R.T. 248:21-249:1). But on repetition of the question it became clear that what the witness meant was that Florida's production and prices might

ffect *Sunkist's* pricing, but obviously not other California sellers who followed Sunkist (Robert McCracken, R.T. 276:18-278:24):

"Q. Aren't these things we have been talking about, Mr. McCracken, the relative economic factors in California and Florida, and the dominant position of the Florida product in the nationwide, single nationwide market, aren't those the things that really control the price of product oranges, orange products, I mean single strength orange juice made in California, isn't it the dominating thing?

A. I don't know how Sunkist really estimates the returns to the packing house——

Q. I didn't ask you that.

A. Well, I have already testified to——

The Court: Just a minute. Don't override the witness.

Mr. Beardsley: I move that the answer be stricken as not responsive.

The Court: It may go out. I don't want you to override the witness. Our biggest problem, I think is that before the witness has answered, you want to ask him another question.

Mr. Beardsley: I am full of questions.

The Court: Maybe he can keep up, but the reporter can't. Have you got an objection?

Mr. Harmon: Yes, your Honor. It is difficult to hear the answer, and in addition if he sees that the answer isn't what he wants then he breaks in.

Mr. Beardsley: I object to that as a conclusion.

Mr. Harmon: It is a pretty obvious conclusion.

The Court: Let's go back and see how much of the answer the reporter got. (Whereupon the

answer was read by the reporter as follows: 'I don't know how Sunkist really estimates the returns to the packing houses . . .')"

Morgan Ward's answer to such question was as follows:

"By Mr. Beardsley: Q. Is it your opinion, then, that the market conditions with respect to Florida product oranges, have more effect on the price of product oranges in California than any other one factor?

A. They have effect on the over-all United States. Then those who set prices on the fruit in California look at what is going on all over the United States, and at that time the prices were set in California by the leading growers, Sunkist set it, using all those things to do it, I assume. But the price of by-products in this state has, ever since I have been in the business since 1934, been set by Sunkist. At one time it was called California Fruit Growers Exchange, and Sunkist at this time." (R.T. 392:1-14).

During the period encompassed in this action (1958-1962) Sunkist maintained high prices for Valencia product oranges. The orange products manufactured from oranges had to compete with like products manufactured by Florida manufacturers from Florida oranges. In every year but one during such period California prices for Valencia product oranges (from which competitive single strength juice was made) were higher than prices of Florida product oranges although Florida oranges contained higher sugar solids and more yield (Warnick, R.T. 1195:12-19; Plf's Exs.

44, 152; Swayne, R.T. 509:9-510:5; Robert McCracken, R.T. 276:3-5). Oranges could be purchased in Florida, processed in Florida and the single strength juice shipped to California and sold cheaper in California than juice processed in California from California oranges (R.T. 134:18-135:15).

Limiting Supplies. During the period involved, Sunkist decreased orange sales to its competing manufacturers of orange products until in 1958 it stopped sales. This was established by testimony of Carl Warwick (R.T. 611:25-614:2; and Plf's Ex. 97B (a graph showing the decline of sales by Sunkist of product ranges); and Wilcox, R.T. 1098:22-24).

Plaintiff's Ex. 88 shows the oranges plaintiff was able to obtain during the period of this lawsuit. Continuously throughout the period plaintiff sought to obtain oranges from all sources that might have fruit available to processors (Swayne, R.T. 670:21 to 691:).

TreeSweet did the same (R.T. 344:1-349:1; 359:14-7). TreeSweet had no trouble meeting its orange needs in Florida (R.T. 708:17-24).

General Foods (R.T. 546:12-15) and Hyland-Stanford Co. (R.T. 515:1-25; 528:13-20) were confronted with the same scanty supply and decreasing ability to obtain oranges to keep their plants operating in California (Wilcox, R.T. 980:11-16).

Sunkist had warned plaintiff and the other independent manufacturers of orange products that when the production of oranges in California and Arizona

dropped to a certain level, it would cease selling oranges to independent processors (Swayne, R.T. 640:3-641:8; Wendell K. McCracken, R.T. 722:2-22; Wilcox, R.T. 1075:5-1078:2). It repeated these warnings in its sale of Valencia product oranges in the bid system (R.T. 595:24-597:5; Plf's Ex. 14). The bid system was instituted in 1956, when Sunkist was progressively decreasing orange supplies to independent processors. The bid system was instituted by Sunkist for sale of all Valencia oranges. Sunkist offered less and less oranges for sale on the bid system until in 1957, processors must bid on unknown quantities of fruit that "may become available" or "it may not". (R.T. 595:7-596:8).

Plaintiff did not make bids on certain offers under the bid system where the prices under the bid system and plaintiff's evaluations indicated that a bid would be highly speculative (R.T. 579:17-24)—or under the 1957 offers where no quantity was specified and the bidder did not know whether he would get fruit when he made a bid (R.T. 592:22-25).

Elimination of General Foods Corporation. By reason of the squeeze of high prices of oranges, inadequate and diminishing supply, Sunkist's competitor General Foods Corporation discontinued its manufacturing of orange products in California in 1958 (Ingalls, R.T. 544:3-548:6). By letter of February 17, 1956, Sunkist through Exchange Orange had cancelled its consignment contract with General Foods (hereinafter discussed) advising General Foods that it appeared that "Exchange Orange Products Com-

pany can process all the fruit" (Plf's Ex. 10; R.T. 1079:7-1080:12). General Foods obtained oranges from Sunkist on the bid system and from wherever it could (R.T. 549:16-550:3). Before moving to Florida General Foods had engaged the Stanford Research Institute to conduct a survey with respect to availability of the orange product supplies in California and Arizona. The "prognosis" of the Stanford Research Institute showed that in view of Sunkist control of oranges there was little likelihood of sufficient supplies (Plf's Ex. 121; R.T. 999:18-999b:23).

Elimination of Hyland-Stanford Corporation. Hyland-Stanford Corporation, a competitor of Sunkist in the sale of orange products (R.T. 513:1-23), who during the period involved obtained its oranges entirely from Sunkist (R.T. 514:4-6), discontinued manufacture of orange products in California in October, 1955, by reason of insufficient oranges to maintain and operate its manufacturing plant. This is eloquently established by letter dated January 3, 1956, of Lee C. Ward, President of Tru-Ade Co. (Plf's Ex. 10C; R.T. 1081:13-1084:4) which company had acquired control of Hyland-Stanford (R.T. 517:23-5). Mr. Ward wrote Exchange Orange that he was one of those "in the industry depending upon you as a source of supply". He offered to maintain and operate the Hyland-Stanford plant on "a ready-to-produce basis" if Exchange Orange would supply sufficient oranges to manufacture for account of Exchange Orange a minimum of "180,000 gallons 65° brix (orange juice) concentrate".

Ward was advised by Sunkist "that we could not do it." (R.T. 1081:13-1084:3). (The processing for Sunkist referred to was under contract whereby Sunkist consigned oranges controlled by Sunkist for manufacture of products for the account of Sunkist, which contracts are hereinafter discussed.)

In April 1955 Sunkist had determined it could process all its fruit, had decided to terminate sales of Valencia oranges to outside processors as rapidly as possible and Hyland-Stanford and other processors had been notified (R.T. 1075:5-1078:2). Sunkist's processing contract with Hyland-Stanford was terminated by letter dated February 17, 1956.

Construction of Florida Plant by TreeSweet Products Co. TreeSweet, a Sunkist competitor in the sale of orange products (R.T. 706:7-25) constructed a plant in Florida in 1955 because it was unable to obtain enough oranges to supply its market in California (R.T. 708:9-21; 725:15-23). It shipped the single strength juice manufactured in Florida to California to sell in California (R.T. 729:24-730:5). TreeSweet was one of the first packers of single strength juice, a leader in the field perhaps packing "more single strength juice than anyone else in California" (R.T. 705:4-15). TreeSweet obtained most of its oranges from Sunkist (R.T. 708:6-8).

Espionage, Threats, Coercion, and Fines to Enforce Sunkist Agreements with Packing Houses. The Sunkist trademark, a valuable emblem for the sale of fresh oranges, was the powerful lever whereby Sun-

ist was able to induce growers to join Sunkist via a trus packing house under a contract whereby if ney marketed fresh oranges under the Sunkist label rough Sunkist they must also market their product anges through Sunkist. Millions of dollars were ent in advertising the label, coming from grower sessments (R.T. 1079:9-25).

Sunkist manager Wilcox was the Sunkist officer harged with forcing the packing houses to market eir product oranges through Sunkist when they ould have preferred selling them to independent ocessors (R.T. 1032:2-11). The Sunkist enforcement policy was instigated after a short interval during which period Sunkist gave packing houses a oice to sell product oranges to independent processors or market them through Sunkist (R.T. 1023:5-26:9; Plf's Ex. 25).

The testimony of Manager Wilcox (R.T. 1028:6-70:6) and Sunkist records (Plf's Exs. 21, 22, 24, 25, , 29, 30, 31, 35, 36, 37, 38, 39, 40, 42, 47, 133 and T. 1690:1-1692:1) show the following "corrective tion" by Sunkist: Espionage on packing houses cluding the following of their trucks (Placentia ange Growers Assoc. R.T. 1039:18-1040:11; Fonaa-Rialto Citrus Assoc. 1047:1-1048:9; Grandview ights Citrus Assoc. R.T. 1060:12-1061:14); threats cancel membership in the Sunkist system (R.T. 29:18-1030:12; 1057:1-1059:13); referring the mat- to a Sunkist tribunal, the "Advisory Committee", consider violations of sale of oranges and recomnd the penalty (R.T. 1028:16-24) followed by the

assessment of liquidated damages (R.T. 1056:4-16; 1067:7-25) or recommendation of cancellation of the Sunkist contract (R.T. 1058:9-15).

The forcing of citrus packing houses to market oranges for product use only through Sunkist was a continuous project with Sunkist. Since the commencement of this action Sunkist has taken what it terms "corrective action" in cases to force its members to market oranges for product use as well as oranges for fresh consumption through Sunkist. These "corrective" measures included assistance to one of its packing houses in litigation against Thomas A. Wilson and Huber G. Wilson; assessment of liquidated damages against Grandview Heights Citrus Assoc.; "warning" letters to Rialto Orange Co., district Exchanges Tapo Citrus Assoc., Earlybest Orange Assoc. and Klink Citrus Assoc. and discussion with district exchange manager re Airdrome Express, Inc. (Interr's, C.T. 1690:1-1962:1). Space does not permit recounting all incidents. We refer the Court to the references to the reporter's transcript, the exhibits and the clerk's transcript, cited above.

Plaintiff was a specific target of Sunkist's "corrective action" during the brief period in 1957 when Sunkist permitted its citrus packing houses to sell oranges to independent processors. The Placentia Orange Distributors (a Sunkist unit), promised plaintiff 5,000 tons of oranges. After Sunkist's change of policy Sunkist would not permit Placentia to fulfill the promise Placentia had made while it was free to sell oranges to plaintiff (R.T. 674:3-679:16).

Consignment Contracts. During periods when Sunkist's manufacturing facilities were insufficient to handle all oranges it controlled, and rather than make its surplus available to independents, Sunkist entered into consignment contracts with manufacturers of orange products including General Foods Corp., Hyland-Stanford Corp., Mission Dry Co. (R.T. 1078:3-9; Plf's Exs. 52, 53). Sunkist supplied oranges and grapefruit, retained ownership of the same and products manufactured therefrom. Since the commencement of this action consignment contracts were also entered into with Anaheim Processors and Holly-Pac. (C.T. 1697:1-32). General Foods and Hyland-Stanford were permitted to purchase some of the products they manufactured (Admission 8, C.T. 1371:12-1372:2).

The quantity of oranges processed by General Foods during the period of this action was small, but the grapefruit was more substantial (Ingalls, R.T. 559:2-13). The processing of Sunkist's grapefruit (as well as Sunkist's oranges) under the consignment contracts freed Sunkist facilities to process more oranges and thereby decreased the supply of oranges available for independent manufacturers of orange products because substantially the same processing machinery is used in the manufacture of grapefruit products as is used in the manufacture of orange products (R.T. 556:17-19). Thus, utilizing consignment contracts for manufacture of either grapefruit or oranges enabled Sunkist to utilize its machinery for manufacture of orange products (Ingalls, and the

Court, R.T. 559:12-560:9). Exchange Lemon also manufactured orange products for Sunkist (Answer C.T. 159:2-17; and Admission, C.T. 159:2-17; Admission 3(h) C.T. 1367:25-1368:26).

When the outlook for orange production was such that Sunkist concluded that its manufacturing facilities would be adequate to handle all oranges it controlled, Sunkist cancelled the consignment contracts with General Foods, Hyland-Stanford and Mission Dry Co. (Plf's Exs. 10, 10A, 10B; R.T. 1075:5-1078:2; 1079:4-1087:18).

Sunkist's prognostication of California orange production and its ability to process all oranges it could control did not prove out. After 1958 orange production in California and Arizona started on the increase (Wilcox, R.T. 1184:5-1187:19; Plf's Ex. 97A; Warnick, R.T. 622, et seq.). Sunkist found itself with oranges it could not process. It sold some of these oranges to manufacturers of orange products other than plaintiff, and others were retained on consignment contracts, as above stated.

In 1956 and 1957 Sunkist made use of its position of dual distribution to depress the prices of single strength orange juice after manufacturers of single strength juice had purchased their orange supplies at Sunkist prices. This resulted in plaintiff losing money. (Paul Case, plaintiff's Vice-president and Plf's Ex. 131; R.T. 786:6-795:25).

In 1956 Sunkist made a bid to furnish orange juice to the United States Department of Agriculture on

he department's school lunch program. The bid was 9¢ per case less than a Sunkist bid to the Department of Agriculture in 1955 on the *same* product *and* he same quantity (Plf's Exs. 148, 149) although ranges were commanding a higher price in 1956 and range products were bringing a higher return (Plf's x. 151). Information on the school lunch program as known to all the industry (R.T. 552:1-18). The range supply was "tight" in 1956 (R.T. 551:22-25). eneral Foods sent a protesting letter to the Department of Agriculture on the Sunkist bid but the Court ould not admit it in evidence (R.T. 553:2-17; Plf's x. 129 for identification). TreeSweet sent a letter nd a telegram to the Department of Agriculture protesting the Sunkist bid which the Court likewise refused to admit in evidence (R.T. 714:1-715:4; Plf's xs. 127, 128 for identification).

Increased Returns and Elimination of California ingle Strength Juice. After Sunkist ceased sales to ndependent manufacturers in 1958, its income soared. he year 1958 was the lowest year in history for production of oranges in California and Arizona, but it as the second highest income year for Sunkist Plf's Ex. 87a; Warnick, R.T. 624:3-625:2) since Vorld War II. The Sunkist income was $183 million, n increase of $13 million over the previous year. unkist's increased income was proclaimed by Manger Wilcox to the Los Angeles Times (Plf's Ex. 112; .T. 1104:4-1105:24).

The secret of high income from low quantity is revealed in the Cold Gold transaction. Cold Gold Co.

was an orange purchaser from Sunkist before Sunkist stopped selling oranges to processors in 1958 (R.T. 1098:15-1099:2). Sunkist thereafter sold Cold Gold bulk orange juice (product No. 8) in lieu of oranges. Prices increased from $.048 per gallon to $.087 per gallon on this substitute for oranges (R.T. 1102:17-1103:11; Plf's Ex. 108). Single strength juice manufactured from oranges in California and Arizona has been practically eliminated from the market while the production of this product has held its own in Florida and Texas (Plf's Ex. 7A; Warnick, R.T. 1193:5-19).

SPECIFICATION OF ERRORS

1. The District Court erred in granting defendant's motion for directed verdict and ordering judgment thereon.

2. The District Court erred in ruling that Sunkist, Exchange Orange and Exchange Lemon were organized in conformance with Sec. 1 of the Capper-Volstead Act and therefore they could not be held in violation of Sec. 1 of the Sherman Act, for conspiring with one another to restrain and monopolize trade in product oranges.

3. The District Court grossly abused its discretion in denying appellant's motion to file a second supplemental complaint.

4. The trial judge displayed such marked prejudice and bias against appellant that if the judgment is reversed, trial of the cause should be held before another judge.

SUMMARY OF ARGUMENT

The Court Erred in Directing a Verdict in Favor of Defendant.

This argument assumes (for the purpose of argument only) that Sunkist Exchange has complied with the provisions of Sec. 1 of the Capper-Volstead Act, which plaintiff challenges, in Point II, infra.

A Capper-Volstead cooperative is liable under Sec. of the Sherman Act for wrongful use of monopoly power and attempt to monopolize.

The evidence was sufficient for the jury to find that Sunkist wrongfully used monopoly power. Such evidence includes: Sunkist domination of the orange industry; boycott of oranges to plaintiff; preventing TreeSweet from delivering oranges committed to plaintiff; establishing high orange prices and limiting supplies so that competitors General Foods and Hyland-Stanford were eliminated from the market and competitor TreeSweet was forced to construct a plant in Florida to meet its California demand for single strength juice; and other acts mentioned below on Sunkist's intent to monopolize.

The evidence was sufficient for the jury to find Sunkist attempted to monopolize oranges.

Intent to monopolize (an element of attempt to monopolize) is not determined by accepting the professions of alleged monopolists or by scrutinizing each item of evidence separately,—but by viewing the evidence *as a whole*. Sunkist's intent is shown by the following evidence: Admitted purpose to control and utilize all oranges; boycott of plaintiff; preventing

TreeSweet from fulfilling commitment to plaintiff; maintenance of high orange prices and elimination of competitors; preventing a Sunkist packing house from fulfilling promise of oranges to plaintiff; policing the Sunkist system to prevent sales to independent manufacturers; wrongful use of dual distribution by squeezing prices on single strength orange juice; use of consignment contracts and low bid on orange juice to Department of Agriculture to limit oranges available to independent manufacturers.

II. Sunkist, Exchange Orange and Exchange Lemon Were Not Organized in Compliance With Section 1 of the Capper-Volstead Act 5 U.S.C. Sec. 371.[3]

Section 1 of the Capper-Volstead Act as applied to Sunkist, Exchange Orange and Exchange Lemon requires that members of a cooperative must be fruit growers who market the fruit they grow through the cooperative, or a cooperative member must be such a cooperative. A substantial number of Sunkist members from whom Sunkist obtained a substantial quantity of its oranges were *not* fruit growers, were *not* cooperatives composed of fruit growers, but were either private profit-making corporations or individuals or partnerships that admittedly did not comply with Sec. 1 of the Capper-Volstead Act. Exchange Lemon was similarly organized. Exchange Orange was a 100% owned subsidiary of Sunkist. The decision of the Court in *Sunkist Growers, Inc. v.*

[3]The defense of Section 6 of the Clayton Act is deemed embraced within the issue of defendant's alleged compliance with Section 1 of the Capper-Volstead Act.

Vinckler and Smith Citrus Products Co., 370 U.S. 19 (1962) involved different issues between different parties on a different record.

I. The District Court Grossly Abused Its Discretion in Denying Appellant's Motion to File a Second Supplemental Complaint.

Plaintiff's motion to file a second supplemental complaint was to allege Sunkist's continuing wrongful use of its continuing monopoly power and continued attempt to monopolize since the filing of plaintiff's supplemental complaint. The pleading was squarely within the provisions of Rule 15(d) Federal Rules of Civil Procedure. The motion was not objected to by defendant when the motion was made. The Court's ground for denying the motion, that there was no motion before it, is contradicted by the record.

V. The Trial Judge Displayed Such Marked Prejudice and Bias Against Plaintiff That If the Judgment Is Reversed Trial of the Cause Should Be Held Before Another Judge.

A trial judge's unwarranted prejudgment of a cause demonstrated in the trial requires the appellate Court upon reversal to order the new trial before another judge. The trial judge's participation in the cause by indicating to the jury that plaintiff's evidence showed no wrongdoing by Sunkist and showing his alignment with defendant, the circumstances and grounds of his adverse rulings against plaintiff on the Capper-Volstead issue and plaintiff's motion to file a second supplemental complaint demonstrated that the trial judge had prejudged this cause.

ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR DIRECTED VERDICT AND ORDERING JUDGMENT THEREON.

A. Introductory.

This argument is premised on the assumption (made for the purpose of this argument only and disputed in Point II, infra) that Sunkist during all the times involved in this action had conformed with the requirements of Sec. 1 of the Capper-Volstead Act and therefore was entitled to such immunity from Sec. 2 of the Sherman Act as the Capper-Volstead Act affords.

The word "cooperative" in the following discussion will be used as referring to an association that has complied with Sec. 1 of the Capper-Volstead Act.

B. Sunkist Wrongfully Used Monopoly Control of Oranges and Attempted to Monopolize Oranges in Violation of Section 2 of the Sherman Act.

1. A Cooperative Is Liable Under Section 2 of the Sherman Act for Wrongful Use of Monopoly Power and for Attempt to Monopolize.

The Supreme Court in *Maryland and Virginia Milk Producers Assn., Inc. v. United States,* 362 U.S. 458 (1960), settled the proposition that a cooperative is an entity; and that apart from carrying out the legitimate objects of the cooperative it may be held accountable under Section 2 of the Sherman Act for monopoly and attempts to monopolize to the same extent that a private business corporation may be held accountable. The Supreme Court's decision in the *Milk Producers* case was presaged by its earlier de-

ision in *United States v. Borden Co.*, 308 U.S. 188 1939), wherein it ruled that cooperatives that conpired with outsiders could be held accountable under he provisions of Sec. 1 of the Sherman Act.

The question of the responsibility of a cooperative or monopoly and attempts to monopolize under Sec. of the Sherman Act was squarely presented in the *Milk Producers* case. The cooperative involved in hat case controlled about 86% of the milk in the Vashington, D.C. area. One charge of the complaint vas that the cooperative had attempted to monopolize nd had monopolized trade in milk in violation of ec. 2 of the Sherman Act. It was alleged that the ooperative had threatened and taken action to induce r compel dealers to purchase milk from the cooperative, induced and assisted others to acquire dealer utlets and attempted to eliminate others from supplying milk to dealers by such conduct as attempting o interfere with truck shipments of non-members' ilk, inducing others to switch from non-members nd boycott. The district Court ruled that this charge vas insufficient in that it was not alleged that the ooperative had conspired with outsiders, and it dismissed the charge.

The Supreme Court reversed the district Court's ismissal of the monopoly charges, remanding the ause for trial of such charge, stating:

> "And the House Committee Report assured the Congress that: 'In the event that associations authorized by this bill shall do anything forbidden by the Sherman Antitrust Act, they will be

> subject to the penalties imposed by that law.' Although contrary inferences could be drawn from some parts of the Legislative history, we are satisfied that the part of the House Committee Report just quoted correctly interpreted the Capper-Volstead Act, and that the Act did not leave cooperatives free to engage in practices against other persons in order to monopolize trade, or restrain and suppress competition with the cooperative."

Time and time again the Supreme Court has cited the *Milk Producers* case and stood by it. *California v. Federal Power Commission,* 369 U.S. 482, 485 (1962); *Sunkist Growers, Inc. v. Winckler and Smith Citrus Products Co.,* 370 U.S. 19, 30 (1962); *Continental Ore Co. v. Union Carbide and Carbon Corp.,* 370 U.S. 690, 709 (1962); *United States v. Philadelphia National Bank,* 374 U.S. 321 (1963).

Since the *Milk Producers* case, two lower Federal Courts have ruled flatly that when a cooperative steps beyond the serving of the legitimate functions of its members and wrongfully uses monopoly power or attempts to monopolize to injure outsiders, the cooperative is accountable for treble damages for violation of Sec. 2 of the Sherman Act as is any other corporate entity.

In *Bergjans Farm Dairy Co. v. Sanitary Milk Producers,* 241 Fed. Supp. 476 (E.D. Mo. 1965), the cooperative controlled over 55-60% of raw milk in the relevant market. It purchased processing plants and engaged in dual distribution, selling some milk

aw and selling other milk as processed milk. Its ontrol of 55-60% of the raw milk gave it power to ontrol prices of raw milk and hence power to squeeze ie profits of its competitors by cutting the price of rocessed milk. It exercised this power and indeendent processors who were injured thereby recovred damages for their losses. The Court ruled that ie exemptions under Secs. 1 and 2 of the Capper-'olstead Act and Sec. 6 of the Clayton Act

> ". . . do not apply to actions of an agricultural cooperative with respect to other non-cooperative corporations or individuals and as to these an agricultural cooperative is subject to the anti-trust laws the same as any other corporation or person. *Maryland & Virginia Milk Product Assn. v. United States.*"

The Court ruled that monopoly power, whether, ained lawfully under the Capper-Volstead Act, under he Patent laws, or by virtue of a natural monopoly, f used unlawfully gives rise to a violation of Sec. 2 f the Sherman Act and amounts to unlawful monoplization, or attempt to monopolize, stating:

> "Great economic power denotes great responsibility in its use because the possibility of injury is so great. *United States v. Aluminum Co. of America,* supra. Sanitary used the economic power of its position as a producer's cooperative to acquire the Quality of O'Fallon plant. It then used the control over the Quality of O'Fallon plant to put itself in the position of being both a competitor with and a supplier to the milk producers in St. Louis and St. Louis County."

334 U.S. 131 (1948); *United States v. Aluminum Co. of America,* 148 F. 2d 416 (2nd Cir. 1945). And when the issue is monopolization, as perhaps distinguished from attempt to monopolize, the requirements of intent are not so demanding and "It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangements." *United States v. Griffith,* supra, at p. 105.

But plaintiff's case does not rest merely on Sunkist's *power* to control prices and exclude competitors and necessary intent. Sunkist wrongfully *exercised* its monopoly power by predatory acts, against plaintiff particularly and against other competing manufacturers of orange products generally. Hence plaintiff's case was embraced within the principles and rulings of the Courts in the *Milk Producers* case, *Bergjans Farm Dairy Co. v. Sanitary Milk Producers,* and *North Texas Producers Assn. v. Metzger Dairies, Inc.,* supra.

It is submitted that the following items of evidence as more fully mentioned in the Statement of the Case would have been sufficient to support a jury's finding that Sunkist wrongfully used monopoly power in violation of Sec. 2 of the Sherman Act.

Boycott. The vast Sunkist organization has boycotted plaintiff and refused to sell plaintiff oranges from the commencement of this action while selling oranges to other manufacturers of orange products "generally" (R.T. 657:8-24; 648:1-665:11; 1184:1-4 C.T. 1693 and Schedule B attached). Size itself is no

wrongful unless, as was stated by Justice Cardozo in *United States v. Swift and Co.,* 286 U.S. 106, 116 (1932), size is "magnified to a point where it amounts to a monopoly". But great size is always an earmark of monopoly. *United States v. Griffith,* supra. Boycott of plaintiff by the mammoth Sunkist organization was wrongful use of monopoly power. *United States v. New York Great Atlantic and Pacific Tea Co.,* 173 F. 2d 79, 87 (7th Cir. 1949).

Preventing TreeSweet from delivering oranges TreeSweet had committed to deliver to plaintiff. Sunkist followed a truck of oranges and finding they were delivered to plaintiff prevented TreeSweet from making further deliveries in fulfillment of TreeSweet's commitment to plaintiff (R.T. 343:3-357:8; 371:19-372:23).

Control of orange prices. Sunkist dominated orange prices and established Valencia orange prices above those existing in Florida (Warnick, R.T. 1195:1-1196:21 and Plf's Ex. 144; R.T. 509:22-510:5; 276:3-; Plf's Ex. 104).

It may be noted that the lower court, in its memorandum and order granting defendant's motion for directed verdict, mystically arrived at opinion that the relevant market for product oranges encompassed the entire United States and relied upon the case of *United States v. E.I. duPont de Nemours & Co.,* 351 U.S. 377, supra (C.T. 2102:7-2104:5). Thus the Court repudiated its own Pre-trial Order (C.T. 1359-60), the understanding of both the attorneys for plaintiff and

defendant of the issues (R.T. 783:20-785:5), and the evidence in the case, which the Court had stated was undisputed, that manufacturers of orange products in California by reason of transportation costs had to depend upon oranges grown in California and Arizona in order to compete with manufacturers in other orange production areas. Further, in the *duPont* case the product was flexible wrapping paper, the relevant market was alleged nationwide; duPont, with its wrapping paper named cellophane, handled about 18% of the relevant market; cellophane had "to meet competition from other materials in every one of its uses" and duPont "could not exclude competitors even from the manufacture of cellophane."

Elimination of competitors. Sunkist's domination of orange prices and supply gave it power to eliminate competitors (or, as with plaintiff, limit their profits) by maintaining high prices for oranges or reducing supplies. Sunkist did both. Sunkist's maintenance of high orange prices coupled with its limiting of supplies forced General Foods Corp. and Hyland-Stanford to abandon their manufacture of orange products in California. It caused TreeSweet Products Co. to construct an orange processing plant in Florida in order to supply its market for single strength juice in California (R.T. 374:19-375:13; 334:19-335:23; 123:15-125:3).

Sunkist's soaring income after it cut off orange supplies and eliminated competitors such as General Foods, Hyland-Stanford (R.T. 544:5-548:6; 513:1-23; 514:4-6; 1081:13-1084:3) and after such cut off had

ompelled companies like Cold Gold to purchase prod-
ts instead of oranges (R.T. 1098:15-1099:2; 1102:
-1103:11) indicated that monopoly power had been
nerated. *United States v. General Electric Co.,* 82
ed. Supp. 753, 895 (D.N.J. 1949).

Additional evidence of Sunkist's wrongful use of
onopoly power is mentioned in argument re Sun-
ist's attempt to monopolize, following. For evidence
wrongful use of monopoly power and attempt to
onopolize overlaps. The statement of the Supreme
ourt in the *Milk Producers* case, 362 U.S. at p. 463
specting Sections 1, 2, and 3 of the Sherman Act is
plicable: "these sections closely overlap, and the
me kind of predatory practices may show violations
all."

Sunkist Attempted to Monopolize Oranges Grown in California and Arizona.

The intent motivating the conduct of a party plays
commanding role as to whether such conduct, which
ight otherwise be lawful, violates the antitrust laws.
he intent of a party motivating his conduct may be
terminative of whether such conduct constitutes an
tempt to monopolize in violation of Sec. 2 of the
herman Act. *Bergjans Farm Dairy Co. v. Sanitary*
ilk Producers, supra; *Picayune Publishing Co. v.*
nited States, 345 U.S. 594, 626 (1953); *United*
tates v. Columbia Steel Co., 334 U.S. 495 (1948);
nited States v. Griffith, 334 U.S. 100, 105 (1948);
nited States v. Paramount Pictures, Inc., 334 U.S.
1 (1948); *United States v. American Tobacco Co.,*
1 U.S. 106 (1911).

Monopolists do not admit bad intent. Hence, proof of intent is generally circumstantial and determined from viewing the conduct of the party and the circumstances surrounding his acts. The issue of good or bad intent is not determined by paying lip service to protestations of innocence by a defendant charged with violation of the antitrust laws. *United States v. Parke, Davis & Co.,* 362 U.S. 29, 44 (1960); *Eastern States Retail Lumber Dealers' Assn. v. United States,* 234 U.S. 600, 612 (1914); *Standard Oil Co. of California v. Moore,* 251 F. 2d 188 (9th Cir. 1958) Cert. denied, 356 U.S. 975 (1958); *American Tobacco Co. v. United States,* 147 F. 2d 93, 106 (6th Cir. 1944), aff'd 328 U.S. 781 (1946).

Nor is intent ascertained by viewing each facet of a cause separately. As stated by the Court in *Continental Oil Co. v. Union Carbide and Carbon Corp.,* 370 U.S. 690, 699 (1962):

> "In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each . . . the character and effect of a conspiracy cannot be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole."

Further, plaintiff, on a judgment based on order directing a verdict against plaintiff must have had the benefit of all reasonable inferences as against contrary reasonable inferences that might be drawn from the evidence. *Continental Ore Co. v. Union Carbide and*

arbon Corp., 370 U.S. 690, 696, 699 (1962); *Schulz v. ennsylvania Rd. Co.,* 350 U.S. 523, 524, 526 (1956); *allick v. Baltimore and Ohio Rd. Co.,* 372 U.S. 108 1963).

Appellant submits: There was sufficient evidence or a jury to find that Sunkist intentionally at- mpted to monopolize the trade in product oranges the relevant market. Further, that such intent was personally" directed at plaintiff.

We refer to the following items of evidence, more lly stated in the statement of the case as sufficient support a finding of a jury that defendant at- mpted to monopolize oranges grown in California d Arizona in violation of Sec. 2 of the Sherman ct.

Defendant's admitted purpose to control and proc- s all product oranges. Sunkist admitted its purpose control all the oranges it could control with inten- on to utilize all of them in its manufacturing facili- es (R.T. 1117:14-16; Admission No. 6, C.T. 1369:25- 370:9). It is noticed that this same intention existed the case of *Bergjans Farm Dairy Co. v. Sanitary ilk Producers,* supra.

Boycott of oranges to plaintiff. As stated supra, e vast Sunkist organization refused to sell oranges plaintiff while selling oranges generally to other anufacturers.

Preventing delivery of oranges to plaintiff by Tree- weet. As stated supra, Sunkist even stopped Tree-

Sweet from delivering oranges to plaintiff which TreeSweet had committed to deliver to plaintiff.

Preventing Placentia Orange Distributors from fulfilling its promise to plaintiff. Sunkist demonstrated its intent to injure plaintiff when in 1957 it prevented Placentia Orange Distributors, a member of its system, from fulfilling a promise to sell plaintiff 5,000 tons of oranges for that year. It had promised these oranges to plaintiff during the short period Sunkist permitted packing houses to sell product oranges to independent processors (R.T. 674:3; 679:16).

Policing the Sunkist system to punish violators of the Sunkist restrictive tying contracts. Sunkist policed the citrus packing houses in its system who were under restrictive tying agreements to market product oranges as well as oranges destined for fresh fruit through Sunkist and to deal exclusively with Sunkist. Indeed, Sunkist interpreted its contracts as prohibiting the packing houses "from even contracting the trade on prices" (R.T. 1028:6-1070:6; 1125:11-1126:17). Whether or not a cooperative may bind suppliers by such contracts in the light of *Northern Pacific Railway v. United States,* 356 U.S. 1 (1958) is one thing. But the contracts and Sunkist's conduct in policing the same by espionage, threats and fines were a clear demonstration of purpose to monopolize.

Wrongful use of dual distribution. The jury was entitled to infer that Sunkist's lowering of prices of single strength juice after competing manufacturers had purchased their oranges at high prices established

Sunkist (R.T. 786:6-795:25) was intentionally done squeeze the profits of these manufacturers and nce constituted predatory conduct.

Consignment contracts. Sunkist's consignment contracts further decreased the orange supply. While nsignment contracts can be valid marketing contracts, they are susceptible to anti-competitive devices. *impson v. Union Oil Co.*, 377 U.S. 13 (1964). Sunst did not use the consignment contracts to market anges, but rather, to continue control of the oranges. the light of all the evidence, a jury was entitled to fer that Sunkist used consignment contracts so that e oranges would not be available to independent anufacturers. When Sunkist conceived it could ocess all oranges it controlled it terminated the conmment contracts (R.T. 1079:4-1080:18; 1075:5-78:2).

Sunkist's bid to the Department of Agriculture. nkist's low bid to the Department of Agriculture r the furnishing of orange juice (Plf's Exs. 148, 9, 151) is in a similar category. Standing alone, the cident would have little significance. But considered the light of the other evidence in the cause (including the scarcity of oranges), the fact that the bid was bstantially lower than the previous year's bid when ange products were considerably higher, the dignant reaction of independent manufacturers (not mitted) which spoke eloquently of the orange situaon, the jury was entitled to infer that a low bid was liberately submitted in order to decrease the orange pply.

II. THE DISTRICT COURT ERRED IN RULING THAT SUNKIST, EXCHANGE ORANGE AND EXCHANGE LEMON HAD COMPLIED WITH SECTION 1 OF THE CAPPER-VOLSTEAD ACT.

If the Sunkist system is removed from the protection that the Capper-Volstead Act does afford to bona fide grower-cooperatives, then there is not even a phantom of defense to one of the most elaborate and powerful and repressive conspiracies and combinations to restrain trade in violation of Sec. 1 of the Sherman Act that has ever existed in the history of antitrust law.

We believe the issue presented with respect to Sunkist's, Exchange Orange's, and Exchange Lemon's alleged compliance with Sec. 1 of the Capper-Volstead Act is one of original impression.

The issue is not complicated. Plaintiff's position is based upon the first sentence of Sec. 1 of the Capper-Volstead Act which provides:

> "That persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged."

Plaintiff's position is that the above quoted provision must be construed as providing that members of a cooperative *must be growers* that market *the product they grow* through the cooperative they organize.

Further, it is accepted that the provisions are complied with if the members of the cooperative consist o

ch cooperatives. For this was the conclusion of the ipreme Court in *Sunkist Growers, Inc. v. Winckler Smith Co.,* 370 U.S. 19, supra, in viewing the Sunst system.

Sunkist. Specifically, then, as relating to Sunkist, e Sunkist members must consist of cooperatives. his is *not* the Sunkist situation. The Sunkist members from whom Sunkist obtained its fruit are citrus cking houses. Prior to the reorganization of Sunkist ctober 31, 1958, the citrus packing houses were not rect members of Sunkist but were members of strict exchanges who were members of Sunkist. By e reorganization of October 31, 1958, the citrus cking houses became direct members of Sunkist tipulation of Relevant Facts and Material Issues of w Relative to Issues Raised by the Capper-Volstead fense, C.T. 1790 et seq.; Sunkist Amended Articles Incorp., Sunkist Growers, Inc.; Plf's Ex. 1A).

The Court will notice that in the stipulation and in nkist's Amended Articles of Incorporation as well in the Sunkist 1955 District Exchange Agreement, ese citrus packing houses are referred to collectively "associations." Even more confusing, these citrus cking house members are likewise referred to as ssociations" in Sunkist's brief to the Supreme ourt in the *Winckler* case, part of which brief is reinafter quoted.

Sunkist's employment of the term "associations" in ferring to *all* of its citrus packing house members a highly deceptive self-serving denomination.

Here is the composition of the Sunkist citrus packing house members as stipulated to by the parties 14.91% of these members (and 12.94% by volume of the oranges marketed by Sunkist) are *not* associations and are *not* cooperatives and are *not* growers. They are private profit-making corporations or individually owned enterprises and partnerships "which do not qualify as, nor do they claim to be cooperative associations under Sec. 1 of the Capper-Volstead Act." (Capper-Volstead stipulation, C.T. 1793:17-28 "agency members"). These private profit-making corporations or individuals or partnerships who are members of Sunkist *do not grow fruit.* The fruit they market through Sunkist is *purchased* from growers. (See Ex. B attached to Capper-Volstead Stipulation a contract between such citrus packing house and growers *"which may be deemed as typical",* C.T. 1821-1822).

An additional 4.97% of the members by number (4.72% by volume) are ordinary corporations which grow citrus but which "do not qualify as, nor are they claimed to be, cooperative associations under Section of the Capper-Volstead Act" (C.T. 1793:4-16).

The make-up of Sunkist members as containing private profit-making corporations, individuals and partnerships as well as cooperatives is also established by Sunkist's answer to Plaintiff's Request for Admission No. 15 (C.T. 1375:1-21).[4]

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[4]In answer to Plaintiff's Interrogatory Nos. 9 and 11, Plaintiff's 3rd Supp. Interr's, Sunkist "dodged" this question, citing the Court's ruling in Pre-trial Order No. 1.

We submit: The first sentence of Sec. 1 of the Capper-Volstead Act should be construed as providing what it specifically does provide, viz.: That only persons engaged in the *production of agricultural products* may act together in a Capper-Volstead association to market the fruit *they grow* through such association; and that an association organized in part by members who are private profit-making corporations or individuals or partnerships that do not grow fruit is not organized in compliance with Sec. 1 of the Capper-Volstead Act.

Specifically as to Sunkist, Section 1 is not complied with by an association composed of only 80.12% fruit growers, 14.91% private profit-making corporations, individuals, and partnerships that do not grow oranges but purchase them and market them through Sunkist, and 4.97% profit-making corporations that admittedly do not qualify for Capper-Volstead protection. The legislative history shows that the Capper-Volstead Act was enacted for *farmer* organizations. *United States v. Maryland Milk Producers Assn.*, supra.

Surely the Capper-Volstead Act means what it says: That a cooperative's members must be growers, does it not?

Exchange Orange. Exchange Orange was a 100% owned private corporation whose stock was 100% owned by Sunkist. Hence it would fall with Sunkist.

Exchange Lemon. The make-up of defendant Exchange Lemon was the same as that of Sunkist (See

Capper-Volstead, Stipulation, C.T. 1791, et seq., particularly 1795:18-25). Thus, it is in the same position as Sunkist.

The Winckler Case. As stated supra, the District Court took the position that the Supreme Court in the *Winckler* case had ruled that Sunkist was organized in compliance with Sec. 1 of the Capper-Volstead Act. The District Court further apparently was of opinion that the decision of the Supreme Court was binding on the parties in this cause. At the March 2, 1964 hearing the Court declared, "I am not going into that issue in this case. I am going to rely upon the Winckler case" (R.T. 22A:21-23) and "Well, the Winckler case disposed of that issue entirely" (RT. 6A:1-2).

When plaintiff's counsel expostulated that plaintiff "spent hours and hours briefing the point" (R.T. 25A:14-15), the Court stated, "I don't know how it came up now and how the issue was raised, but I am going to rule that they have complied." (R.T. 45A:16-18). The Court so ruled despite the fact that plaintiff was not a party to the *Winckler* case and despite the fact that *Winckler* did not challenge Sunkist's compliance with the Capper-Volstead Act but conceded that Sunkist was a cooperative.

We realize that this Court is well aware that as plaintiff was not a party to the *Winckler* case that case is not *binding* on plaintiff. But inasmuch as this apparently was the trial Court's position; and inasmuch as Sunkist eagerly adopted this position "in almost the Court's language" when queried by the

trial judge (R.T. 24A:6-11), we present the following points with respect to the *Winckler* case:

First: The Supreme Court's grant of certiorari was premised on *Winckler's concession* that Sunkist, Exchange Orange and Exchange Lemon were cooperatives and that the issue was limited to whether these parties, *as cooperatives,* could be guilty of conspiracy under the Sherman Act in agreeing among themselves in the marketing and processing of their fruit. The grant of certiorari could not be clearer on this:

> "Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit granted limited to Question 1 presented by the petition which reads as follows:
>
> "1. Where a group of citrus fruit growers form a cooperative organization for the purpose of collectively processing and marketing their fruit, and carry out those functions through the agency of three cooperative agricultural associations, each of which is basically wholly owned and governed by those growers, *and each of which is admittedly entitled to the exemption from the antitrust laws accorded to agricultural cooperatives by the Capper-Volstead Act* (7 U.S.C. sec. 291)—is an unlawful conspiracy, combination or agreement established under Sections 1 and 2 of the Sherman Act (15 U.S.C. § 1, 2) upon proof only that these growers, through the agency of these three cooperatives, *agreed among only themselves* with respect to the extent of the division of the function of processing between them or with respect to the price they would charge in the open market for the fruit and the by-products thereof processed and marketed by them?" (Emphasis

supplied) *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 368 U.S. 813 (1961).

Second: The limited question decided by the Supreme Court was whether or not the trial court's instruction, that Sunkist, Exchange Orange and Exchange Lemon, albeit cooperatives, could be guilty of conspiracy under Sec. 1 of the Sherman Act by agreeing amongst themselves to acts authorized by the Capper-Volstead Act was erroneous. This is most clear by the Supreme Court's opinion.

Third: And perhaps of most importance—the record made by plaintiff in the instant case, as above mentioned, showed that about 20% of Sunkist citrus packing house members were private profit-making corporations, individuals and partnerships most of whom did not grow the oranges they marketed through Sunkist, and none of whom qualified for the protection of the Capper-Volstead Act. It appears that no such record was made in the *Winckler* case. To the contrary, in pages 5-6 of Sunkist's opening brief to the Supreme Court filed February 7, 1962 in the *Winkler* case it is indicated that Sunkist handled only fruit of "Sunkist grower-members" that were organized into local associations:

> "About 12,000 individual growers of citrus fruit in the states of California and Arizona, whose average productive holding is about 16 acres each, have joined together for the purpose of 'collectively processing, preparing for market, handling and marketing' their fruit and its by-products . . . that organization over the years has evolved

into and has taken the form of three non-profit agricultural cooperative corporations (Growers, E.O.P. and E.L.P.)[5] which are the agencies to whom have been delegated the processing and marketing functions necessary to get the grower-members fruit and fruit products to market. *Each of these corporate entities handles only the fruit of Sunkist grower-members* . . . Each of them complies in all respects with the organizational and other conditions prescribed by the Capper-Volstead Act for immunity from the sanctions of the antitrust laws in respect of such collective processing, handling and marketing of agricultural products. Indeed, that they do so comply was conceded below by all concerned . . .

"This agricultural cooperative organization was referred to below as the Sunkist System. That term was used to mean not merely the one corporate entity called Sunkist Growers, Inc. but the entire organization—from the grower up through his intermediate associations . . . to the three corporate entities (Growers, E.O.P., and E.L.P.) into which the growers are organized that exists for the purpose of processing and marketing the products of its grower-members. It included also the functions of processing and marketing carried on by the various components of that organization . . . Sunkist is an organization, everyone agreed below, substantially the same as other marketing organizations organized under the Capper-Volstead Act . . .

"*At the base of the Sunkist system are* the *individual growers. It is their fruit, and only their*

[5] "Growers", refers to defendant Sunkist Growers, Inc., E.O.P. and E.L.P. refer to Exchange Orange and Exchange Lemon.

> *fruit, that is handled by Sunkist.* It is they who control and manage all components of the Sunkist cooperative organization. *The individual growers have organized into local associations.* The local associations, in turn organized into twenty-two district exchanges each of which is governed by a board composed of grower-member representatives of the local associations included in it. Each district exchange selects one grower-member to be its representative on the governing board of Sunkist Growers, Inc. All representatives serve without compensation." (Our emphasis)

More succinctly, Sunkist on page 24 of its brief represented:

> "It is still the underlying farmers who are combining; *it is only their products that are being processed and marketed; it is only their instrumentalities, controlled and managed by them,* that are doing the processing and marketing." (p. 24; our emphasis.)

The respondent Winckler did not challenge Sunkist's description of the Sunkist system. To the contrary, on page 7 of his brief Winckler stated (filed March 7, 1962):

> "With a few additions deemed essential to an adequate factual presentation, respondents accept petitioner's description of the organization and functions of the constituent elements of the so-called Sunkist system of cooperatives."

It appears that the Supreme Court in the *Winckler* case accepted this record as indicating that *all* Sunkist packing house members were grower associations:

"Sunkist Growers, Inc., has at its base 12,000 growers of citrus fruits in California and Arizona. *These growers are organized into local associations which operate packing houses.*" (Emphasis supplied) (370 U.S. at p. 21)

"In sum, *the individual growers involved each belong to a local grower association.*" (Emphasis supplied) (370 U.S. at p. 22).

That was according to the record made in *that* case; but on the stipulated record in *this* case, Sunkist was *not* organized in compliance with the provision of Sec. 1 of the Capper-Volstead Act and hence is not entitled to any immunity such act may afford.

II. THE DISTRICT COURT GROSSLY ABUSED ITS DISCRETION IN DENYING PLAINTIFF'S MOTION TO FILE A SECOND SUPPLEMENTAL COMPLAINT.

The Second Supplemental Complaint alleged facts occurring since the filing of the original complaint and fell squarely within the provisions of Rule 15(d), *Federal Rules of Civil Procedure.*

Defendant literally had years of notice. The pleading was designed to terminate the lengthy litigation by an award of damages suffered to the period ending 1/31/64 and for injunctive relief thereafter (C.T. 1283 et seq., 1786 et seq.).

Rule 15(d) contemplates leave to file supplemental pleadings as a matter of course under such circumstances and denial of leave constitutes an abuse of discretion. *New Amsterdam Casualty Co. v. Waller,*

323 F. 2d 20 (4th Cir. 1963); *Cert. denied,* 376 U.S. 963 (1964); *McHenry v. Ford Motor Co.,* 269 F. 2d 18 (6th Cir. 1959). Particularly should this be so when in denying plaintiff's motion to file the supplemental complaint the court states as grounds: That an oral ruling from the bench is not binding until reduced to writing and signed by the court and there was no motion before the court to file a second supplemental complaint (C.T. 126A:15-18). The Court must have been aware of plaintiff's pending motion of March 2, 1964, never withdrawn, and his favorable pronouncements thereon on March 2, and May 18, 1964—else why his statement that an order is not final until reduced to writing and signed?

The Court apparently was expostulating on plaintiff's failure to file a written motion in the form as provided by the Court's local rules (C.T. 126A:1-14). Written notice was given as stated above, but more controlling: Procedural defects with respect to the application for leave to amend were waived when defendant failed to object to the application at the March 2, 1964 hearing. *Arp v. United States,* 244 F. 2d 571 (10th Cir. 1957), *Cert. denied,* 355 U.S. 826 (1957); *Mutual Life Ins. Co. of New York v. Egeline,* 30 F. Supp. 738 (N.D. Cal. 1939); 60 C.J.S. p. 15, sec. 12; p. 21, sec. 19. Moreover, Rule 7(b) F.R.C.P. specifically provides for making an oral motion in open court.

The Court also stated that the second supplemental complaint brought in new issues (C.T. 134A:18-22). We believe a reading of the complaint, the supple-

nental complaint and the proposed second supplemental will dispel this as a possible valid ground for denying leave to file the second supplemental complaint. The supplemental pleadings in substance allege continuing wrongful use of a continuing monopoly power and continuing attempt to monopolize. The only change in complexion of the cause was introduced in the supplemental complaint (permitted by another judge) when Exchange Orange and Exchange Lemon merged into Sunkist. This permitted more effective abuse of monopoly power (See defendant's answer to Interr. 14, Plf's 3rd Supp. Interr. C.T., unnumbered page following p. 1706).

Supplemental pleadings to terminate involved and costly proceedings in one trial have been held proper even after proceedings have been remanded after appeal for further proceedings. *City of Texarkana v. Arkansas Gas Co.,* 306 U.S. 188 (1939).

The aggravated circumstances of the Court's denial (where plaintiff had to re-prepare its exhibits during trial), speak for themselves.

Nothing was gained by the lower Court's ruling but inviting continuing lawsuits embracing the precise issues of the instant cause.

If the cause is reversed, plaintiff should be permitted to file a second supplemental complaint alleging facts occurring since the filing of the supplemental complaint to date of new trial.

IV. THE TRIAL JUDGE DISPLAYED SUCH MARKED PREJUDICE AND BIAS AGAINST PLAINTIFF THAT IF THE JUDGMENT IS REVERSED TRIAL OF THE CAUSE SHOULD BE HELD BEFORE ANOTHER JUDGE.

Plaintiff is of course aware of the provisions of 28 U.S.C. Sec. 144 providing for the filing of an affidavit in the District Court for disqualification of a district Court judge. In this cause, however, the bias of the trial judge was his unwarranted prejudgment of the merits of the case as demonstrated in the trial of the case. The provisions of 28 U.S.C. Sec. 144 are not applicable to such situation. As stated by the Court in *Knapp v. Kinsey,* 235 F. 2d 129, at 131 (6th Cir. 1956) *Cert. denied* 352 U.S. 892 (1956), on petition for rehearing of the Court's decision in 232 F. 2d 458:

> "under the circumstances [where bias demonstrated in trial] the remedy can not be by a change of judges during the trial; it necessarily becomes a matter of alleged prejudicial error and for correction by the Court of Appeals."

When bias at the trial is demonstrated, the appellate court upon reversal will order the new trial before another judge. *United States v. Drumm,* 329 F. 2d 109 (1st Cir. 1964); *Knapp v. Kinsey,* 232 F. 2d 458; *Crowe v. DiManno,* 225 F. 2d 652 (1st Cir. 1955).

The conduct of the trial judge in the instant case falls squarely within the holding of the Court in the *Kinsey* case, 232 F. 2d at p. 466. The Court there ruled that "when the remarks of the judge during the course of a trial, or his manner of handling the trial, clearly indicate a hostility to one of the parties, or an

unwarranted prejudgment of the merits of the case, or an alignment on the part of the Court with one of the parties for the purpose of furthering or supporting the contentions of such party, the judge indicates, whether consciously or not, a personal bias and prejudice which renders invalid any resulting judgment in favor of the party so favored." See also *Crowe v. DiManno, supra.*

The Supreme Court in *Continental Oil Co. v. Union Carbide and Carbon Corp.,* supra, ruled that a district Court, in determining whether a plaintiff's evidence shows violation of the Sherman Act, may not scrutinize each component separately and wipe the slate clean. But that is precisely what the trial Court in this case did to the evidence of plaintiff's witnesses as such evidence was in the process of being adduced. The trial judge by his leading questions to the witnesses emphatically indicated to the jury that the witnesses testimony was insufficient to show wrongdoing by Sunkist; or the Court would disparage the testimony. This, together with his statements upon sustaining defendant's objections to plaintiff's questions, showed that the judge had prejudged the cause adversely to plaintiff. It goes without saying that the "whole" record must be examined to get the "whole" picture. But following are examples. We briefly state the point of the witnesses' testimony followed by quotation of a pertinent part of the Court's participation.

Morgan Ward. Testimony of principal witness on Sunkist price control:

"The Court: You say you followed the Sunkist price. That was voluntary on your part, wasn't it? . . . You weren't forced by Sunkist to follow the price were you? . . . You didn't think the Sunkist price was excessive as far as you were concerned? . . . One other question. You were not forced in any way to follow the Sunkist price? . . ." (R.T. 338:15 to 339:7).

W. K. McCracken. Sunkist limiting of orange supplies:

"The Court: And you knew that Sunkist had a priority on its own fruit. . . . And you knew that when Sunkist used its own fruit, that the only fruit available to other processors was fruit that Sunkist could not use, isn't that right?" (R.T. 723:5-19).

Robert Buchheim. Testimony of high prices and price control under Sunkist sale of Valencia oranges by bid system:

"The Court: When oranges were put up for bid, you were never excluded, were you?" (R.T. 337:24 to 339:22);

Testimony of limiting of orange supply. No ground of objection:

"The Court: Sustained. I don't think that is an issue in this case, whether they could use more oranges or not." (R.T. 344:1-25).

Testimony that Sunkist prevented TreeSweet from fulfilling commitment of oranges to plaintiff:

"The Court: You continued with your commitments to Case-Swayne didn't you, after this conversation?"

The witness did not oblige the Court and testified *no* (R.T. 355:25 to 357:7).

Carl Warnick, C.P.A., who testified as to figures showing that when Sunkist had the least amount of fruit it had the highest income per ton (R.T. 625) and also highest total income (R.T. 629:5-21, Plf's Ex. 97A):

> "The Court: Is there anything strange in that? . . . When there is more fruit there is a lower market, that is true isn't it? That is your experience, isn't it? . . . You say your speciality is cost accounting, is that right? . . . Isn't it true that in cost accounting you have found in any industry, regardless of what it is, that where there is a large amount of product, the price is low, and when there is a short amount of product, the price is high?" (R.T. 625:5-626:1).

F. R. Wilcox. On defendant's objection to question of whether Sunkist used consignment contracts to decrease oranges available to independent manufacturers: Ground of objection "argumentative":

> "The Court: Sustained. It assumes a fact that is not in evidence. The fact in evidence is that Sunkist preferred to process its own fruit." (R.T. 1097:17-24).

Testimony of increased orange production after Sunkist had stopped orange sales in 1958:

> "The Court: If the groves are five years or less old, you don't have additional product to amount to anything." (R.T. 1186:17 to 1187:19).

Amos Swayne. Testimony of why plaintiff did not bid for oranges:

"The Court: I don't think counsel should argue the case to the jury in this particular way.

Mr. Beardsley: I don't think so either . . .

The Court: You could have bid . . . [and when testimony was Sunkist rejected all bids]

Well, I don't know . . . this might be the first offer on a new crop. . . . Maybe Sunkist didn't want to accept." (R.T. 582:10 to 585:6).

Sunkist stopping sales of oranges:

"The Court: He wasn't just picking you out, he was just picking the industry out, is that it . . ." (R.T. 642:25 to 644:3).

Rufus Horne. Whether Hyland-Stanford could obtain sufficient oranges to operate profitably. Defendant objected on the ground it was a "conclusion":

"The Court: . . . whether or not he made a profit is immaterial" (R.T. 526:16-19).

We also mention the circumstances of the rulings of the trial judge that Sunkist, Exchange Orange and Exchange Lemon had complied with Section 1 of the Capper-Volstead Act and denying plaintiff's motion to file a second supplemental complaint. "Adverse rulings during the course of the proceedings are not by themselves sufficient to establish bias and prejudice". *Knapp v. Kinsey*, 232 F. 2d at p. 466. But the judge's precipitous adverse ruling on the Capper-Volstead issue without reading and before accepting and filing the stipulation of the parties was a particularly illuminating indication of bias—without regard to whether or not such ruling was erroneous. This issue would have been for the jury save for the

stipulation. *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500 (1959). Sunkist would have had the burden of establishing its compliance with the Capper-Volstead Act by a preponderance of evidence. Yet the trial judge ruled on this issue *sua sponte.* His order on the Capper-Volstead issue (April 22, 1964, C.T. 307-10) was entered five months before he accepted and filed the stipulation (Oct. 27, 1964, C.T. 1790). The stipulation alone vested the Court with jurisdiction to decide the Capper-Volstead issue under the stipulated facts. But the judge decided the issue on the opinion of the Supreme Court in the *Winckler* case. Sunkist could hardly have used the *Winckler* opinion as evidence of its compliance with Section 1 of the Capper-Volstead Act.

Further, the Court's ground for denial of the plaintiff's motion to file a second supplemental complaint, that no motion was pending, was contradicted by the record. It is even indicated that counsel's failure to associate local counsel, even though plaintiff's counsel were both admitted to practice before the Court (R.T. 27A:1-12), might have played a part in such ruling (R.T. 126A:1-14).

It is perhaps human nature for bias, albeit unconscious, to induce adverse rulings, whether such rulings be erroneous or correct. That is more reason that a trial should be before a judge that has not pre-judged the cause.

Plaintiff respectfully submits that this Court should reverse the judgment of the trial Court and that the Court should further order:

(a) that the lower Court's ruling that Sunkist, Exchange Orange and Exchange Lemon had complied with Section 1 of the Capper-Volstead Act was erroneous, and that these parties had not complied with Section 1 of the Act and were not entitled to any immunity from the antitrust laws that the Act may afford;

(b) that the lower Court abused its discretion in denying plaintiff's motion to file a second supplemental complaint and that plaintiff be permitted to file supplemental pleadings setting forth occurrences since the date of the supplemental complaint to the date of the new trial;

(c) that the cause be remanded for immediate trial before another judge.

Dated, San Francisco, California,
October 22, 1965.

J. Edward Johnson,
W. Glenn Harmon,
William H. Henderson,
By W. Glenn Harmon,
Attorneys for Appellant.

Certificate of Attorney Responsible for Preparation of Brief

I certify that, in connection with the preparation of his brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

W. Glenn Harmon
Attorney for Appellant.

(Appendices A and B Follow)

Appendix A

LIST OF PLAINTIFF'S EXHIBITS

References are to pages in Reporter's Transcript

Number	For Id.	Offered	Received	Rejected
1	82	1210	1210	
1A	82	1132	1132	
2	82	1211	1211	
7A, 7AT		1192	1192	
8, 8T	82	644	644	
9, 9T	82	1133	1133	
9D, 9DT	82	983	983	
9E, 9ET	82	983	983	
9F, 9FT		983	983	
9G	82	983	983	
9GT	82	1071	1071	
10, 10T	82	1078	1078	
10A, 10AT	82	1078	1078	
10B, 10BT	82	1078	1078	
10C, 10CT	82	1080	1080	
11, 11T	82		496	
11A	82		496	
11C	82		496	
11T	82		496	
12	82		496	
12A	82		496	
12B	82		496	
13	82		496	
13A	82		496	
13B	82		496	
13C	82		496	
13Cp3	587	587	587	
13D	82		496	
14, 14T	82		496	
15	82	737	737	747

Number	For Id.	Offered	Received	Rejected
15T	82	737	737	747
18, 18T	82	967	967	
20, 20T	82	1022	1022	
21, 21T	82	1026	1026	
22, 22T	82	1026	1026	
23, 23T	82	1126	1127	
24, 24T	82	1026	1026	
25, 25T	82	1026	1026	
27	82	1210	1210	
28, 28T	82	1035	1035	
29, 29T	82	1034	1034	
30, 30T	82	1034	1034	
31, 31T	82	1034	1034	
32	82	1211	1212	
33	82	1212	1212	
34, 34T	82	971	971	
35, 35T	82	1045	1046	
36, 36T	82	1045	1046	
37, 37T	82	1045	1046	
38, 38T	82	1045	1046	
39, 39T	82	1045	1046	
40, 40T	82	1045	1046	
42, 42T	82	1045	1046	
43	82	1212	1213	
45	82	1212	1213	
46, 46T	82	1045	1046	
47, 47T	82	1045	1046	
52	82	554	554	
53	82	1088	1088	
54	82	1088	1088	
71	82	1099	1099	
72	82	1099	1099	
73	82	1099	1099	
74	82	1099	1099	
75	82	1099	1099	
88, 88T	82	667	667	
92, 92T	82	461	461	

Number	For Id.	Offered	Received	Rejected
93	82	1213	1213	
97, 97T	609		626	
97A, 97AT	609		621	
97B, 97BT	610	610	610	
97C, 97CT	609	619	620	
102, 102T	649	649	649	
102A, 102AT		649	649	
103, 103T	82	1115	1115	
104, 104T	233	609	609	
106, 106T	82	1124	1124	
108, 108T	82	1099	1100	
112, 112T		1103	1103	
114, 114T	233	379	379	
115, 115T	159	160	160	
116, 116T	168	168	168	
117, 117T	481	481		483
118, 118T	535	535	536	
121	539	994	999	
124A, 124AT	1189	1189	1190	
125	472	487	487	
126, 126T	615	615	615	
127	714	714		715
128	714	714		715
129	553	553		553
130, 130T	765	765	765	
131, 131T	768	777	777	
132, 132T	790	791	791	
133, 133T	1059	1060	1060	
143, 143T	1000	1001	1001	
144, 144T	1194	1194	1195	
146, 146T	1095	1095	1095	
147, 147T	1202	1202	1202	
148	1198	1198	1198	
149	1198	1198	1198	
150, 150T	1199	1199	1199	
151, 151T	1199	1999	1200	
152, 152T	1195	1200	1200	

Appendix B

LIST OF DEFENDANT'S EXHIBITS

Referenees are to pages in Reporter's Transcript

Number	For Id.	Offered	Received	Rejected
(All Deft's Exhs. preceded by letters SK)				
SK 70, 70T			896	
71, 71T			894	
72, 72T			901	
75, 75T			903	
78, 78T			908	
90, 90T			913	
149, 149T			887	
178			410	
179			409	
181			407	
182			408	
183			406	
183T			410	
185, 185T			401-2	
190T			417	
202		423		
203		424		
205		428		
206		429		
207		429		
208		430		
209		804		
209A		810		
210		847	851	
210T, pp. 142			851	
211		848	851	
211T			851	
212, 212T		859	859	
212A, 212AT		861	861	